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Supreme Court, U.S.
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No. 00-846

IN THE

Supreme Court of the United States

TERRY JOHNSON,

Petitioner,

v.

TELE-CASH, INC. and COUNTY BANK OF REHOBOTH BEACH, DELAWARE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

The caption of this case in the Court of Appeals for the Third Circuit is *Terry Johnson v. West Suburban Bank, Tele-Cash, Inc. and County Bank of Rehoboth Beach, Delaware*, No. 00-5047. The Petitioner correctly asserts that the parties are:

Terry Johnson, Plaintiff-Petitioner ("Johnson")

Tele-Cash, Inc., Defendant-Respondent ("Tele-Cash")

County Bank of Rehoboth Beach, Delaware, Defendant-Respondent ("County Bank")

Upon motion filed by Johnson in the district court, and by order dated May 19, 1999, all claims asserted against West Suburban Bank were dismissed with prejudice.

Pursuant to Rule 29.6, Tele-Cash and County Bank state that there is no parent or publicly held company that owns 10% or more of the stock of these corporations.

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COUNTER-STATEMENT OF THE CASE

The facts of this case are not complicated and, for the most part, are accurately set forth by Johnson. Johnson did request and receive from County Bank a short term, single advance, unsecured loan in the amount of $250 which was evidenced by a Note And Disclosure Statement dated July 10, 1998 (the "Note"). The Note contained an arbitration agreement under the terms of which Johnson and County Bank voluntarily agreed that any claim or dispute arising from or relating to the Note, including claims regarding the validity of the Note and the agreement to arbitrate disputes, shall be resolved by binding arbitration by and under the Code of Procedure of the National Arbitration Forum ("NAF"). The parties agreed that the arbitration agreement was made pursuant to a transaction involving interstate commerce and shall be governed by the Federal Arbitration Act, 9 U.S.C. §§ 1-16 (the "FAA"). Johnson does not dispute that the arbitration agreement is governed by the FAA; that is not an issue before this Court.

Johnson is, however, mistaken when he states that his loan was conditioned upon repayment by means of an electronic funds transfer, which is prohibited under the Electronic Funds Transfer Act (the "EFTA"), 15 U.S.C. § 1693k. Repayment of the loan by Johnson did not involve the type of recurring electronic fund transfer that is prohibited by the EFTA and Regulation Z, 12 C.F.R. § 205.2(k). Repayment of Johnson's loan was to be effected through a single, pre-authorized debit to Johnson's bank account by either a debit entry or a check drawn against an account designated by Johnson. The manner of repayment of the loan is nonetheless irrelevant because the merits of Johnson's claims are not before this Court.

Johnson also incorrectly states that his loan "would be repeatedly rolled over." A "rollover" occurs when the maturity date is extended on an existing loan. No new disclosures are provided in a rollover as none are required by law. County Bank's short term loans are not "rollover" loans which occur without executing new loan documents or providing new loan disclosures. *See* 12 C.F.R. § 226.20(a). When payment becomes due, the borrower has the following payment options: (1) pay the loan and finance charge in full; (2) pay the finance charge and make partial payment of the principal loan amount and refinance the balance pursuant to the terms of a new loan note and disclosure statement, or (3) pay the finance charge and refinance the entire principal loan amount by executing a new loan note and disclosure statement. Under options two and three, the existing obligation is satisfied and replaced with a new obligation. New disclosures are made and a new finance charge is imposed. These transactions are not "rollovers" but constitute the refinancing of existing obligations as defined under Regulation Z, 12 C.F.R. § 226.20(a), for which new disclosures are required and provided.

Johnson contends that County Bank's standard form notes do not comply with the provisions of the Truth-in-Lending Act (the "TILA"), 15 U.S.C. §§ 1630 and 1632, because the Annual Percentage Rate and Finance Charge disclosures were not more conspicuous than other required conspicuous disclosures. This relates to the remedies available under the TILA, not the enforceability *vel non* of the arbitration clause. In fact, the particular "conspicuousness" violation pled by Johnson is not such a material violation that would entitle Johnson or the putative class to statutory damages. *See* 15 U.S.C. § 1640(a)(2); *see also Brown v. Payday Check Advance, Inc.*, 202 F.3d 987 (7th Cir. 2000).

The United States District Court for the District of Delaware did not find that the arbitration agreement was unconscionable. *Johnson v. West Suburban Bank*, 82 F. Supp.2d 264, 268 (D. Del. 2000). Nor was the arbitration agreement found to be so one-sided as to be oppressive even though a contract of adhesion. *Id.* Rather, the district court found that there was an "inherent conflict" between compelling arbitration and the underlying purposes of the TILA and the EFTA when an action was brought on behalf of a class of affected consumers. *Id.* at 271.

Using the framework established by this Court in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), the Third Circuit reversed the district court finding no irreconcilable conflict between arbitration and the goals of the TILA or the EFTA. *Johnson v. West Suburban Bank*, 225 F.3d 366 (3d Cir. 2000). While recognizing as logical Johnson's argument that a class action award acts as a penalty against lenders who violate the TILA, the Third Circuit found that the rights created by the TILA remain available to an individual and are capable of vindication in an arbitration forum. As the Third Circuit explained, the loss of the availability of a class action in arbitration does not mean the loss of any substantive right or frustrate the purposes and goals of the TILA. *Id.* at 373, 374.

REASONS FOR DENYING THE WRIT

I. THE *JOHNSON* DECISION DOES NOT INVOLVE A QUESTION OF EXCEPTIONAL IMPORTANCE.

The *Johnson* decision does not involve a question of exceptional importance for this Court to decide. It presents an issue that has been decided adversely to Johnson many times in similar contexts by this and other courts.[1] *See Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987); *Gilmer v. Interstate /Johnson Lane Corporation*, 500 U.S. 20 (1991); *Rodriguez De Quijas v. Shearson/ American Express, Inc.*, 490 U.S. 477 (1989); *Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 7 F.3d 1110 (3d Cir. 1993); *Bowen v. First Family Financial Services, Inc.*, 2000 U.S. LEXIS 29621 (11th Cir. 2000).

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1. [W]e agree with the other courts that have addressed this issue. *See Johnson*, 225 F.3d at 378 n. 5; *Wood*, 102 F. Supp.2d at 1350; *Thompson v. Illinois Title Loans, Inc.*, F. Supp.2d, 2000 U.S. Dist. LEXIS 232 (N.D. Ill. 2000). We hold that, for purposes of the ECOA, specifically 15 U.S.C. §§ 1691(a)(3), Congress did not create a non-waivable right to pursue TILA claims in a judicial forum, either individually or through a class action. It follows that the plaintiffs cannot show that when First Family required them to sign an agreement to arbitrate any claims arising under the TILA, it discriminated against the plaintiffs in violation of §§ 1691(a)(3) because they had exercised a right under the Consumer Credit Protection Act.

Bowen v. First Family Financial Services, Inc., 2000 U.S. LEXIS 29621 (11th Cir. 2000) at page 19.

While the lower court's decision was the first Circuit Court to address the issue of whether there is an inherent conflict between the TILA and EFTA and arbitration, the Eleventh Circuit has recently reached the same result in the context of an Equal Credit Opportunity Act claim and held that there is no inherent conflict between TLIA and arbitration. *Bowen, supra.*[2] More importantly, the Third Circuit's decision in favor of Tele-Cash and County Bank does not conflict in any material respect with well settled principles of law applicable to the resolution of this issue.[3]

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2. [W]e recognize, of course, that a class action is an available, important means of remedying violations of the TILA. See 15 U.S.C. §§ 1640. "However, there exists a difference between the availability of the class action tool, and possessing a blanket right to that tool under any circumstance." [citation omitted]. An intent to create such a "blanket right," a non-waivable right, to litigate by class action cannot be gleaned from the text and the legislative history of the TILA.

(Citation omitted). *Id.* at page 16.

3. In a factually similar case, *Green Tree Financial Corporation v. Randolph*, 531 U.S. __, No. 99-1235, 2000 U.S. Lexis 8279 (December 11, 2000), this Court recently addressed a related issue of whether an arbitration agreement is *per se* unenforceable because it fails to affirmatively protect a party from potentially steep arbitration costs (ruling in favor of the lender). In her dissenting opinion, Justice Ginsburg, noting that Randolph alternatively argued for affirmance on the ground that the arbitration agreement was unenforceable because it precluded pursuit of a statutory claim as a class action, stated that she did not read the Court's opinion to preclude resolution of that question by the Eleventh Circuit. Given the Eleventh Circuit's observations on this issue in the *Bowen* case, it seems highly unlikely that the Eleventh Circuit would not rule consistent with the Third Circuit in this case.

II. THE PRINCIPLES OF *GILMER* ARE APPLICABLE TO THIS CASE.

Johnson argues that his case should be exempt from this Court's holding in *Gilmer* because the plaintiff in *Gilmer* was not paying for the arbitration. While it is true that Johnson *may* be required to pay a fee under the arbitration agreement at issue in this case, that fee is modest and may be waived where the consumer is indigent.[4] The National Arbitration Forum ("NAF"), before which all arbitration claims must be filed under the arbitration agreement at issue in this case, has a comprehensive set of rules governing procedures and costs of arbitration. The minimum filing fee for small claims brought by consumers is $49. *See* Appendix A, Code of Procedure of the NAF, Appendix C. Telephonic and in-person hearing fees on consumer claims range from $50 to $75. *Id.* A consumer who is indigent and cannot afford to pay fees may request that the fees be waived. *See* Rule 45 of the NAF. A prevailing party may also recover his/her costs. *See* Rule 44 E of the NAF.

For these reasons, Petitioner Johnson's argument on the obligation to pay fees and costs is of no avail in this case.

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4. The NAF arbitration forum was subject to extensive review and approved by the district court in *Marsh v. First USA Bank, N.A.*, 103 F. Supp.2d 909 (N.D. Tex. 2000), which also rejected plaintiff's argument that he could not be compelled to arbitrate claims because doing so forced him to forgo his right to proceed as a class action.

III. THERE IS NO INHERENT CONFLICT BETWEEN THE AGREEMENT TO ARBITRATE AND THE TILA AND EFTA.

Johnson argues that *Gilmer* is distinguishable because in this case he was required to give up his right to proceed as a class action. This is not, however, a distinguishing factor. This very argument was raised and rejected by this Court in *Gilmer*. The fact that an arbitration agreement makes no provision for class action relief does not in and of itself render the arbitration agreement unenforceable.[5] As noted by the Third Circuit, "The notion that there is a meaningful distinction between vindicating a statute's social purposes and adjudicating private grievances for purposes of determining whether a statute precludes compelling arbitration under a valid arbitration clause was rejected by [this Court] in [Gilmer] [citation omitted]". *Johnson*, 225 F.3d at 374.

Petitioner Johnson erroneously argues that TILA and EFTA specifically provide for civil fines in class actions and that this remedy is not available in arbitration. Civil fines and punitive damages may in fact be awarded in arbitration. A claimant in arbitration may obtain the same relief that is available in a judicial forum. The only difference is that a claimant does not have the procedural right to seek class

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5. Unless an arbitration agreement provides for class actions, a court may not order an arbitration to proceed as a class action. *Champ v. Siegel Trading Co., Inc.*, 55 F.3d 269 (7th Cir. 1995) (citing the Second, Fifth, Sixth, Eight, Ninth and Eleventh Circuit decisions that hold that, absent the parties' agreement, the district court is without power to order consolidated arbitrations); *see also Zawikowski v. Beneficial National Bank*, 1999 WL 35304 (N.D. Ill. Jan. 11, 1999).

action status. It is clear, therefore, that a claimant is not deprived of any remedy in arbitration except the possible procedural right of proceeding on behalf of other claimants.

Johnson's right to obtain the full range of remedies available under TILA and EFTA may not be gainsaid. Rule 20(d) of the NAF authorizes arbitrators to "grant any remedy or relief allowed by applicable substantive law and based on a Claim, Response, or Request properly submitted by a Party under this Code." *See* Appendix A, Rule 20 of the NAF. Because Johnson "effectively may vindicate" his claims under both the TILA and EFTA in arbitration, these statutes "will continue to serve both [their] remedial and deterrent functions." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 472 U.S. 614, 637 (1985).

This Court has made clear that the presumption in favor of arbitration established by the FAA is a powerful one. "Having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." *Mitsubishi*, 472 U.S. at 628. The burden of establishing that Congress meant to preclude arbitration rests with the party who seeks to avoid arbitration. *Gilmer*, 500 U.S. at 26. Any such inquiry must give deference to the federal policy favoring arbitration. An intention to preclude arbitration must be found in the text of the statute, its legislative history or in an "inherent conflict" between arbitration and the statute's underlying purposes. *Id.* The district court rested its finding on the third category, and found a conflict on the conclusion that "without the possibility of class action liability looming on a creditor's horizon, there is a very real possibility that these entities will not voluntarily comply with the Truth-in-Lending regulations." *Johnson*, 82 F. Supp.2d at 271.

The Third Circuit's reversal of this conclusion is based on two observations. First, the TILA's and EFTA's public policy goals are not undermined by arbitration since class actions are not necessary to provide deterrence or fulfill any of the other goals of these acts. *Johnson*, 225 F.3d at 373-375. Second, the TILA and EFTA do not create an unwaivable right to bring a class action. *Id.* at 377.

Indeed, the class action damage provisions of § 1640 of the TILA does not manifest a congressional intent to make class actions the primary relief under the TILA, nor do they establish a statutory right to class action relief. Section 1640 is a limitation on damages that may be awarded in a class action. *Lopez v. Plaza Financial Co.*, 1996 WL 210073 (N.D. Ill. April 25, 1996). Such provisions restricting class recovery do not embrace a congressional intent to make "private attorney generals" the primary mechanism for enforcement of the TILA or the EFTA through class actions.[6] This is

6. The authorities cited by Johnson do not support his argument that Congress intended the enforcement of the TILA to be accomplished by "private attorney generals" suing in a judicial forum. In *Broughton v. Cigna Healthplans of California*, 988 P.2d 67 (Cal. 1999), the court rejected the plaintiff's argument that her statutory claim under the Consumer Legal Remedies Act was not subject to arbitration. Although the court refused to refer a demand for injunctive relief to arbitration, it did so on the narrow grounds that the injunction sought was beyond the arbitrator's power to impose. *Thomas v. Myers-Dickson Furniture Company*, 479 F.2d 740 (5th Cir. 1973) and *James v. Home Construction Company of Mobile, Inc.*, 689 F.2d 1357 (11th Cir. 1982) held only that an award of attorney's fees under the TILA allows the claimant to participate in the policing of the TILA and is consistent with the notion of enforcement by "private attorney generals." The remedies available to Johnson in an NAF forum include statutory and punitive damages, declaratory and injunctive relief, as well as attorneys' fees. *See* Rule 20 of the Code of Procedure of the NAF.

evident by the many other legislative and regulatory enforcement mechanisms that are designed to foster compliance with the TILA, the EFTA, and other federal consumer protective laws and regulations. *See Johnson*, 225 F.3d at 375; *see also Bowen, supra.*

The Third Circuit's analysis and the reasoning applied to reach the result it did is not at odds with any precedent of this Court and does not conflict with any other Circuit Court. Nor does it conflict with the text or the legislative histories of the TILA or the EFTA.

CONCLUSION

For the reasons set forth above, Tele-Cash and County Bank respectfully request that this Court deny the petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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